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No. 09

IN THE

Supreme Court of the United States

INTERNATIONAL COMFORT PRODUCTS, LLC,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §§ 1381, et. seq., added to the Employment Retirement Income Security Act (ERISA) a provision imposing withdrawal liability on "an employer" who "withdraws from a multiemployer pension plan in a complete withdrawal or a partial withdrawal," 29 U.S.C. § 1381(a).

The question presented is:

Whether a company that never agreed to make contributions to a pension plan can be an "employer" subject to MPPAA withdrawal liability when its vendor, which had agreed to contribute to the plan under a collective bargaining agreement, withdraws from the plan and does not pay the statutorily imposed withdrawal liability.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATMENT

The caption contains the names of all the parties to the proceeding below.

International Comfort Products, LLC is wholly owned by Carrier Corporation. Carrier Corporation is wholly owned by United Technologies Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner International Comfort Products, LLC (ICP) seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 585 F.3d 281 (6th Cir. 2009) and reproduced in the appendix to this Petition ("App.") 1a-13a. The order of the court of appeals denying ICP's petitions for rehearing and rehearing en banc is not reported and is reproduced at App. 45a. The opinion of the United States District Court for the Middle District of Tennessee is not reported and is reproduced at App. 14a-44a.

JURISDICTION

The United States Court of Appeals issued an opinion and judgment on October 23, 2009. App. 1a. A timely petition for rehearing and rehearing en banc was denied on February 18, 2010. App. 45a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The MPPAA sections at issue in this case are reproduced at App. 46a-48a.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a direct, acknowledged conflict among the courts of appeals over whether a company that never agreed to contribute to a multiemployer

pension plan can be forced to pay MPPAA withdrawal liability when its vendor, which had agreed to contribute to the plan under a collective bargaining agreement, withdraws from the plan and does not pay the statutorily imposed withdrawal liability. Until the decision below, the courts of appeals consistently declined to impose MPPAA withdrawal liability on companies that had not agreed, in a collective bargaining or other agreement, to contribute to the plan. Absent such a contractual contribution obligation, the courts held, a company is not an "employer" within the meaning of MPPAA, which imposes withdrawal liability on an "employer" who "withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal," 29 U.S.C. § 1381(a). See, *e.g.*, *Transpersonnel, Inc.* v. *Roadway Express, Inc.*, 422 F.3d 456, 460 (7th Cir. 2005); *Rheem Mfg. Co.* v. *Cent. States Se. & Sw. Areas Pension Fund*, 63 F.3d 703, 706 (8th Cir. 1995); *H.C. Elliott, Inc.* v. *Carpenters Pension Trust Fund for N. Cal.*, 859 F.2d 808, 813 (9th Cir. 1988).

In the decision below, the Sixth Circuit expressly declined to follow that precedent and held that petitioner ICP, who never agreed to contribute to a multiemployer pension plan, may nonetheless be an "employer" liable under MPPAA for the unpaid withdrawal liability of its vendor who *had* agreed to contribute to the plan. In reaching this result, the court mistakenly believed its sister circuits had overlooked *Laborers Health & Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), and language in a different MPPAA provision referencing an employer's "'obligation to contribute'" to a plan "under applicable labor-management relations law," 29 U.S.C. § 1392(a)(2). Contrary to the Sixth Circuit's belief,

neither *Advanced Lightweight* nor section 1392(a) addresses *who* is an "employer" obligated to pay MPPAA withdrawal liability under section 1381(a). They address instead the separate question of *when* an employer who agreed in a collective bargaining or other agreement to contribute to a multiemployer plan is deemed to have made a "complete withdrawal" from the plan, and thus becomes obligated to pay MPPAA withdrawal liability.

By mistakenly conflating section 1392(a)(2)'s "obligation to contribute" language with the definition of "employer" and departing from uniform precedent in other circuits, the Sixth Circuit misperceived and disrupted the MPPAA statutory scheme, yielding a result not contemplated by Congress or this Court's precedents. Under the Sixth Circuit's rule, a company that neither contributed nor had any contractual obligation to contribute to a multiemployer pension plan may nonetheless be held jointly liable for unpaid withdrawal liability of a separate, independent company with whom it did business. This holding threatens to impose potentially crippling withdrawal liability on companies like ICP who never agreed to contribute to multiemployer plans and never foresaw they might incur MPAAA liability merely by entering leasing arrangements with vendors who had agreed, in collective bargaining or other agreements, to contribute to such plans on behalf of their employees.

The decision also creates an uncertain legal climate for the more than 1500 multiemployer pension plans covered by MPPAA and the thousands of companies who contribute to, or do business with companies who contribute to, these plans. If left unreviewed, the decision will deprive companies and plan administrators of a "'predictable set of liabilities, under

uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards,'" which was an important objective Congress sought to achieve by enacting ERISA. *Conkright* v. *Frommert*, 130 S. Ct. 1640, 1649 (2010) (quoting *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002)).

This Court's review is therefore warranted to resolve the circuit conflict, clarify who is an "employer" subject to withdrawal liability, and restore a predictable set of liabilities under MPPAA.

STATEMENT OF THE CASE

1. ICP is a Delaware company that manufactures and distributes heating and cooling products in Lewisburg, Tennessee.[1] In 1971, ICP entered an agreement with Top Transportation Services, Inc. (Top) under which Top supplied its truck drivers to transport ICP products from the Lewisburg manufacturing plant to a warehouse in LaVergne, Tennessee, about 60 miles away. App. 17a.

The 1971 Agreement provided that Top would bill ICP for Top's

> "actual costs and expenses of operation hereunder plus an amount equal to ten percent (10%) thereof as an operating margin. Such costs and expenses shall include, but not be limited to, direct wages, salary payments, payroll taxes and

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[1] As did the decision below, this Petition refers to ICP and its predecessors (Heil-Quaker Corporation, Inter-City Products Corporation (USA) and International Comfort Products Corporation (USA)) as "ICP." *See* App. 2a, 17a.

> necessary fringe benefits, insurance and administration applicable to the operations."

Id.

In 1992, Top and ICP signed a successor agreement under which Top continued to provide truck driver services to ICP on a cost-plus basis. The 1992 Agreement required Top to bill ICP for

> "its actual costs and expenses of operation hereunder plus a weekly service charge of $35.00 per employee. Such costs and expenses shall include, but not be limited to, direct wages, salary payments, payroll taxes and necessary fringe benefits, insurance and administration applicable to the operations."

App. 18a.

When the 1971 and 1992 Agreements were executed and at all relevant times thereafter, Top was signatory to a collective bargaining agreement with a local Teamsters union that required Top to contribute to Respondent Central States, Southeast and Southwest Areas Pension Fund (the "Fund"). App. 18a. ICP was not a signatory to that bargaining agreement and never entered into any contract with the Fund or the union. *Id.* Indeed, the 1992 Agreement stated that Top, not ICP, would "'handle all labor relations and the negotiating of union contracts and shall enter into any and all labor contracts covering the drivers who are its drivers and are in the service of [ICP].'" *Id.* at 3a (alteration in original). In negotiations leading to the execution of the 1992 Agreement, Top and ICP never discussed the concept of MPPAA withdrawal liability. *Id.* at 19a.

In 1995, ICP relocated its LaVergne distribution facility to a location across the street from its Lewis-

burg plant. App. 20a. As a result, ICP required fewer truck drivers from Top to transport manufactured products between the facilities.

In February 2002, ICP terminated the 1992 Agreement with Top. App. 20a. Soon thereafter, Top terminated its drivers who had been working at ICP's facilities, and by April 2002, Top had discontinued all business operations. *Id.*

2. The Fund considered Top's termination of its drivers to be a "withdrawal" under MPPAA and issued notices in April 2002 to collect withdrawal liability from Top, Top's control group members, and ICP. App. 21a. Between 2003 and 2004, the Fund obtained default judgments for withdrawal liability against Top and some members of its control group. *Id.* In 2005, the Fund obtained a consent judgment against other control group members (Meritas Group, LLC, Meritas Group Enterprises, Inc., and Meritas PEO, LLC). The same day the consent judgment was issued, Meritas's owner assigned Top's rights under the 1992 Agreement to the Fund. *Id.*

3. After failing to collect withdrawal liability from Top and members of its control group, the Fund filed suit against ICP in the District Court for the Middle District of Tennessee in April 2007, seeking to collect over $1 million in withdrawal liability, interest, penalties and attorney's fees. App. 21a, 29a. The Fund alleged ICP had joint and several liability with Top under the MPPAA withdrawal liability provisions, the common law doctrine of equitable assignment, and the 1992 Agreement. *Id.* at 25a-43a. On July 3, 2008, the district court resolved the parties' cross-motions for summary judgment, granting ICP's motion and denying the Fund's. *Id.* at 44a-45a.

The district court first addressed the Fund's claim that ICP is an "employer" liable for the withdrawal liability owed to the Fund when "an employer" "withdraws from a multiemployer pension plan in a complete withdrawal or a partial withdrawal," 29 U.S.C. § 1381(a). Because the MPAA does not define the term "employer," the district court looked to circuit court precedents for guidance. App. 25a.

While the Sixth Circuit had not yet addressed that question, the district court noted that several circuits have held that "for MPPAA purposes, the definition of employer is a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." App. 26a (internal quotations omitted). Moreover, the Eighth Circuit had held, in a case the district court found factually similar to this one, the nature of the "'obligation to contribute establishing an entity as an "employer" for MPPAA purposes'" is "'contractual'"; therefore, the "'party who is a signatory to a contract creating the obligation to contribute is the "employer" for purposes of establishing withdrawal liability.'" *Id.* (quoting *Rheem Mfg.*, 63 F.3d at 707). Likewise, the district court recognized, the same conclusion had been reached on similar facts by the Seventh Circuit in *Transpersonnel* and the Northern District of Ohio in *D.C. Transportation Services, Inc.* v. *Coca-Cola Bottling Co. of Northern Ohio*, 835 F. Supp. 1002 (N.D. Ohio 1994). App. 27a-29a.

The district court believed the reasoning of these courts was correct and that "adopting their approach helps effectuate Congress' intent of creating a uniform body of federal employee benefits law." App. 30a. Applying that precedent to the facts here, the court found it "undisputed that Top, not ICP, signed a series of collective bargaining agreements with the

Teamsters union obligating Top to contribute to the fund on behalf of the drivers." *Id.* at 29a. ICP "never signed a collective bargaining agreement," was "never a signatory to any document obligating it to contribute to the Fund," and was "never part of Top's controlled group." *Id.* "In all respects," the court concluded, "Top was the only party obligated to contribute under the plan." *Id.* (internal quotations omitted). The court therefore held that "because ICP was not a signatory to any agreement obligating it to contribute to [the Fund], it was not an employer subject to the withdrawal liability incurred by Top." *Id.*

The court likewise rejected the Fund's argument that ICP and Top were "joint employer[s]" who, under the Fund's interpretation of the statute, "had an obligation to contribute to the Pension Fund under labor law pursuant to 29 U.S.C. § 1392(a)." App. 30a. Even were it to assume *arguendo* that Top and ICP were joint employers, the district court held ICP would not be jointly liable for Top's withdrawal liability because courts "have generally refused to expand the definition of employer" under ERISA "to include entities which were not a party to the collective bargaining agreement under which suit is brought." *Id.* at 31a (internal quotations omitted) (quoting *Schembre* v. *New Constr. Res., LLC*, 2006 WL 1134474, at *4 (E.D. Miss. Apr. 25, 2006) (unreported) (in turn quoting *Xaros* v. *U.S. Fid. & Guar. Co.*, 820 F.2d 1176, 1179 (11th Cir. 1987)).

The district court also rejected the Fund's other claims, holding that the common law "equitable assignment" claim has "no merit as a matter of law," and the 1992 Agreement does not obligate ICP to pay withdrawal liability. App. 36a, 43a.

4. On appeal, the Sixth Circuit affirmed judgment for ICP on the Fund's common law and contract claims, but reversed as to the Fund's MPPAA claim.[2]

The Sixth Circuit agreed with the judicially-crafted definition of "employer," undefined by the MPPAA, other courts had developed. App. 5a-6a. It explicitly rejected, however, the "rule" of the Seventh, Eighth and Ninth Circuits that "an entity's obligation to contribute must be 'created by contract' in order for the entity to be an employer under the MPPAA," *Id.* at 7a. As an initial matter, the panel characterized most decisions that serve as the "rule's foundation" as "merely suggest[ing] that contractual obligations might be the most *common* type, and not the *only* type, of obligation to contribute among MPPAA employers." *Id.* at 7a-8a.

The Sixth Circuit then asserted that other courts erred when, having created a definition that asks whether an "entity has an 'obligation to contribute' to a plan," they overlooked the meaning of the phrase "obligation to contribute" in 29 U.S.C. § 1392(a). App. 8a. In the Sixth Circuit's view, that section makes it "unmistakably clear" that "an obligation to contribute to a plan may arise not only from a contract, but also from 'applicable labor-management relations law.'" *Id.* at 9a (quoting 29 § U.S.C. 1392(a)(2)).

The Sixth Circuit also said this Court had "specifically held as much" in *Laborers Health* v. *Advanced Lightweight.* App. 9a. The court quoted *Advanced Lightweight* language stating that the term, "obligation to contribute" is "'defined for purposes of withdrawal liability portion of the statute in language that *unambiguously includes* both the

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[2] Judge White concurred in reversal on the MPPAA claim, but dissented from affirmance on the contract claim. App. 12a-13a.

employer's contractual obligations *and any obligation imposed by the NLRA* [which the Court equated with applicable labor-management relations law].'" *Id.* (quoting 484 U.S. at 545-46) (Sixth Circuit's emphases and alteration). The court concluded:

> If an obligation to contribute is the touchstone of employer status under the MPPAA – and we agree that it is – then the dictates of the statute and Supreme Court alike compel the conclusion that employer status may arise from not only a contractual obligation, but also an obligation "under applicable labor-management relations law."

Id. at 10a (alteration omitted) (quoting 29 U.S.C. § 1392(a)(2)).

The court of appeals thus reversed the judgment for ICP and remanded "for a determination whether ICP had an obligation to contribute to the Fund 'under applicable labor-management relations law.'" App. 10a. The panel left it to the district court to decide in the first instance "whether that determination can be made only by the National Labor Relations Board." *Id.*

ICP's timely motion for rehearing en banc was denied. App. 45a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

MPPAA amended ERISA to impose withdrawal liability on "an employer" who "withdraws from a multiemployer pension plan in a complete withdrawal or a partial withdrawal," 29 U.S.C. § 1381(a).

Because MPPAA does not define the term "employer," the courts of appeal have looked to the definition in ERISA, which states that an "employer" is "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan," *Id.* § 1002(5). Adapting that definition – which focuses on the entity's relationship to the employee benefit plan – to the MPPAA context, the courts have concluded that an employer is "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." *Korea Shipping Corp.* v. *N.Y. Shipping Ass'n*, 880 F.2d 1531, 1537 (2d Cir. 1989) (internal quotations omitted); *accord Seaway Port Auth.* v. *Duluth-Superior ILA Marine Ass'n Restated Pension Plan*, 920 F.2d 503, 507 (8th Cir. 1990); *Carriers Container Council, Inc.* v. *Mobile S.S. Ass'n*, 896 F.2d 1330, 1342-43 (11th Cir. 1990); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 85 F.3d 1282, 1287 (7th Cir. 1996).

Thus, rather than grappling with who might be considered an "employer" under common law, the National Labor Relations Act (NLRA) or other statutory schemes, the courts of appeals have asked who had a contractual obligation to contribute to the plan. Companies that agreed to contribute to a multiemployer plan, through a collective bargaining agreement or plan document, are "employers" who must pay withdrawal liability under MPPAA when they cease to make contributions and withdraw from the plan. *E.g.*, *Korea Shipping*, 880 F.2d at 1537-38; *Carriers Container*, 896 F.2d at 1343-44; *H.C. Elliott*, 859 F.2d at 813. Until the decision below, the courts of appeals had declined to view as an "employer" subject to MPPAA withdrawal liability companies who, like ICP, had *not* agreed to contribute to a

multiemployer plan and were not under common control with a business that agreed to contribute under a collective bargaining or other agreement. *E.g.*, *Transpersonnel*, 422 F.3d at 460; *Rheem*, 63 F.3d at 706.[3]

Rheem, like this case, involved a manufacturer of heating and air conditioning equipment that leased truck driver services from a trucking company that had signed a collective bargaining agreement requiring it to make contributions to a pension fund. 63 F.3d at 704-05. After the manufacturer terminated the leasing agreement, the trucking company stopped contributions to the fund and was assessed withdrawal liability under 29 U.S.C. § 1381. *Id.* at 705. When the trucking company went into liquidation, the fund sought to collect the unpaid portion of its withdrawal liability from the manufacturer. *Id.* The Eighth Circuit rejected this request, holding that the manufacturer was not an "employer" for purposes of MPPAA because "it had not signed a contract obliging it to contribute to the pension fund." *Id.* at 707. The court noted that the leasing agreement stated that the trucking company would provide the benefits required by any collective bargaining agreement, and it was the trucking company, not the manufacturer, who signed the collective bargaining agreement imposing the obligation to contribute to the pension fund. *Id.*

The Seventh Circuit reached the same result on similar facts in *Transpersonnel*. There, a motor carrier leased truck driver services from a company that was party to a collective bargaining agreement obligating it to contribute to a pension fund. 422 F.3d

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[3] Under MPPAA, two businesses in the same "control group" are treated as a "single employer." 29 U.S.C. § 1301(b).

at 458. The carrier, who was not a signatory to the collective bargaining agreement, had agreed in the leasing agreement to reimburse the trucking company for pension fund contributions made on behalf of the drivers whose services the carrier leased. *Id.* Explaining that the relevant MPPAA question is whether the "alleged" employer had a contractual obligation to contribute to the fund, *id.* at 460 (citing *Cent. Transp.*, 85 F.3d at 1287), the Seventh Circuit found no such contractual obligation existed: An "obligation to *reimburse* for contributions made by another is not the equivalent of an obligation to *contribute* in the first instance," *Id.* at 461. The court therefore declined to hold the carrier liable for the trucking company's unpaid MPPAA withdrawal liability. "[I]n the absence of fraud allegations," the court concluded, "an entity not contractually obligated to make contributions to a pension fund [will] not be considered an 'employer' for purposes of withdrawal liability under the MPPAA." *Id.* at 462; see also, *e.g.*, *Seaway,* 920 F.2d at 509 ("employer" subject to withdrawal liability is one "*contractually bound to make pension contributions*" under a bargaining or other agreement); *H.C. Elliott, Inc.*, 859 F.2d at 813 ("'employer' describes one who was a signatory employer with respect to the plan").

The Sixth Circuit acknowledged but expressly declined to follow this precedent. App. 6a Instead, it focused on the definition of "obligation to contribute" in 29 U.S.C. § 1392(a), concluding that this subsection makes it "unmistakably clear" that under MPPAA, an "obligation to contribute to a plan may arise not only from a contract, but also from 'applicable labor-management relations law.'" App. 8a-9a (quoting subsection). Believing this Court's decision in *Advanced Lightweight* "specifically held as

much," *id.* at 9a, the Sixth Circuit held that ICP may be liable for Top's unpaid MPPAA withdrawal liability if ICP had an obligation to contribute to the plan "'under applicable labor-management relations law.'" *Id.* at 10a.

The Sixth Circuit misread both the statute and this Court's precedent. See *infra* at 17-21. Plainly, liability under the MPPAA should not turn on the fortuity of geography. This conflict among the courts of appeals on an important ERISA issue warrants this Court's review.

II. THE DECISION BELOW UNDERMINES THE CORE ERISA GOAL OF ENSURING THAT PENSION PLANS AND PLAN SPONSORS ARE SUBJECT TO A UNIFORM BODY OF BENEFITS LAW.

The Sixth Circuit's departure from established precedent in other circuits and its holding that a company who had not agreed to contribute to a pension plan could be liable for the unpaid MPPAA withdrawal liability of a vendor undermine the core ERISA goal of ensuring "that plans and plan sponsors [are] subject to a uniform body of benefits law," *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990). "Uniformity is impossible, however, if plans are subject to different legal obligations in different States." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). That is now the case for thousands of employers and multiemployer pension plans governed by MPPAA.

There are approximately 1,510 active multiemployer defined benefit pension plans, covering about 10.1 million participants. Pension Benefits Guar. Corp., Introduction to Multiemployer Plans, http://www.pbgc.gov/practitioners/multiemployer-

plans/content/page13645.html (last viewed June 15, 2010). Because such plans are, by definition, funded by multiple employers who may reside in different states,[4] the circuit conflict means that a single pension plan can be subject to different rules for determining who is an "employer" subject to MPPAA withdrawal liability.

Thus, companies who have agreed to contribute to multiemployer pension plans, and those with whom they do business, may be subject to different withdrawal liability rules depending on where they reside or do business, or perhaps where the plan chooses to bring suit. See 29 U.S.C. § 1451(d) (venue in ERISA actions lies "in the district where the plan is administered or where a defendant resides or does business"). Indeed, the respondent Fund here has brought similar actions in other circuits with very different results. Compare *Rheem*, 63 F.3d at 707 (8th Cir.) (rejecting Fund's argument that company was an "employer" subject to MPPAA withdrawal liability even though it never had a contractual obligation to contribute to the plan), and *Cent. Transp.*, 85 F.3d at 1287 (7th Cir.) (rejecting similar argument by Fund), with App. 7a-8a (6th Cir.) (adopting Fund's argument). This unquestionably undermines Congress's goal of a "uniform body of benefits law," which is among the core "guiding

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[4] ERISA defines a "multiemployer plan" as

> a plan – :
>
> (A) to which more than one employer is required to contribute,
>
> (B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
>
> (C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation . . . .

29 U.S.C. § 1301(a)(3).

principles" of this Court's ERISA jurisprudence, *Conkright*, 130 S. Ct. at 1648, cf. *id.* at 1650 (reversing decision under which plan participants "could be entitled to different benefits depending on where they live, or perhaps where they bring a legal action").

Because the decision below departs from 20 years of established precedent, it also threatens companies like ICP with substantial MPPAA withdrawal liabilities they did not anticipate (and could not reasonably have anticipated) when they entered into a leasing agreement with a company that contributed to a multiemployer plan under a collective bargaining or other agreement. See App. 19a (district court finding that withdrawal liability was not discussed when Top and ICP negotiated the 1992 Agreement). The decision also creates substantial uncertainty for those companies considering whether to enter into similar leasing agreements in the future – an uncertainty magnified by the fact that, depending on a plan's funded status, withdrawal liability may be large enough even to imperil a business's survival. See, *e.g*, *Mason & Dixon Tank Lines, Inc.* v. *Cent. States, Se. & Sw. Areas Pension Fund*, 852 F.2d 156, 160-62 (6th Cir. 1998) ("partial withdrawal" due to decertification vote of five-employee bargaining unit of one employer in "controlled group" could trigger $17 million withdrawal liability under Fund's reading of statutory formula).

This Court's review is warranted to resolve the circuit conflict and remove the uncertainty so that all employers who participate in multiemployer pension plans, and the businesses with whom they have contractual relationships, are subject to a "'predictable set of liabilities'" under MPPAA. *Conkright*, 130 S. Ct. at 1649 (quoting *Rush Prudential*, 536 U.S. at 379).

III. THE COURT OF APPEALS MISREAD BOTH THE MPPAA SECTION ON WHICH IT RELIED AND THIS COURT'S *ADVANCED LIGHTWEIGHT* DECISION, YIELDING A RESULT CONGRESS DID NOT CONTEMPLATE.

Congress enacted ERISA "to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place." *Conkright*, 130 S. Ct. at 1648. Instead, Congress left the decision whether to establish a plan, and if so, what kind of benefits to provide "largely to the private parties creating the plan." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). The decision below, in holding that ICP may be liable for withdrawal liability under MPPAA even though it never agreed to contribute to the Fund, departs from this principle and reaches a result not intended by Congress.

The Sixth Circuit reached this incorrect result by fundamentally misreading the MPPAA section on which it relied. It erroneously read the "obligation to contribute" language in 29 U.S.C. § 1392(a) in isolation, instead of in its proper context as one of several sections that together specify when withdrawal liability arises. *Cf. United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (statutory interpretation is holistic). The dispositive issue is the meaning of "employer" for withdrawal liability purposes. But section 1392(a) does not address *who* is an employer; it addresses *when* an employer incurs withdrawal liability.

As noted, MPPAA imposes withdrawal liability on "an employer" who "withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal." 29 U.S.C. § 1381(a). A "complete with-

drawal" (such as Top's here) occurs when an employer "permanently ceases to have an obligation to contribute under the plan," *id.* § 1383(a)(1). And section 1392(a) provides that an employer permanently ceases to have an "obligation to contribute" under the plan when it ceases to have an obligation to contribute

> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but
>
> does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Id. § 1392(a).

Had Congress not included this reference to "applicable labor-management relations law," MPPAA would have imposed withdrawal liability upon expiration of the collective bargaining or other agreement that required the employer to contribute to the plan. That could have led to a situation where an employer would be obligated to pay MPPAA withdrawal liability even when it had a continuing obligation to contribute to the plan. This could occur because under the NLRA, an employer who signs a collective bargaining agreement requiring contributions to a multiemployer plan may not cease contributing simply because that agreement has expired. Instead, as this Court explained in *Advanced Lightweight,* the employer may have a duty under the NLRA "to continue making such contributions after the expiration of the contract and while negotiations for a new contract are in process." 484 U.S. at 541.

Plainly, as long as the employer has an ongoing duty to contribute to the plan under the NLRA, there is no reason to impose withdrawal liability – which, as this Court recognizes, is intended to ameliorate the "burden placed upon the remaining contributors to a multiemployer fund when one or more of them withdraw." *Id.* at 545. Hence, in the overall context of MPPAA's withdrawal liability scheme, the evident and sensible purpose of section 1392(a)'s reference to a plan contribution obligation arising "under applicable labor-management relations law" is to defer imposition of such liability until *after* the employer's obligation to contribute expires under the collective bargaining or related agreement *and* the employer has no legal duty under the NLRA to continue to abide by the terms of that expired agreement.[5]

Advanced Lightweight does not support the Sixth Circuit's reasoning; it undermines it. This Court was not addressing whether a company that had not agreed to contribute to a pension plan could be an "employer" under MPPAA, because the employer in *Advanced Lightweight* had signed two collective bargaining agreements requiring it to contribute to eight multiemployer pension plans. 484 U.S. at 541-42. Instead, the question presented was whether the plans had an *ERISA* cause of action to recover

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[5] Because ICP and Top are not a "single employer" within the meaning of 29 U.S.C. § 1301(b), and ICP never contributed to the Fund, ICP would have no withdrawal liability under the analysis put forward by the Pension Benefit Guaranty Corporation in two Opinion Letters addressing similar fact patterns. 85-14 Op. Pension Benefit Guar. Corp. (1985), *available at* http://www.pbgc.gov/oplet/85-14.pdf; 86-10 Op. Pension Benefit Guar. Corp. (1986), *available at* http://www.pbgc.gov/oplet/86-10.pdf.

contributions the employer was obligated to make, but did not pay, under the NLRA after expiration of the bargaining agreements. *Id.* at 541. This Court held the plans could not bring such an action because the ERISA remedy to recover unpaid contributions "is limited to the collection of 'promised contributions' and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to make postcontract contributions constitutes a violation of the NLRA." *Id.* at 548-49.

In so holding, the Court distinguished the MPPAA provision that requires employers to make the contributions required "under the terms of the plan or under the terms of a collectively bargained agreement," 29 U.S.C. § 1145, from the withdrawal liability provisions, which impose such liability upon expiration of the employer's contribution obligation under the bargaining agreement *and* the post-contract obligation to contribute imposed by the NLRA. *Advanced Lightweight*, 484 U.S. at 545-46 & nn.10, 11. This showed that Congress did not intend to create ERISA remedies for plan contribution obligations arising under labor law.

More importantly for purposes of the question presented in this case, *Advanced Lightweight* illustrates the potential "obligation to contribute" arising from "applicable labor-management relations law" referenced in section 1392(a) *presupposes* a prior *contractual* obligation to contribute under a collective bargaining or related agreement (such as a plan agreement). Nothing in the decision or the statute suggests that some unspecified "labor-law duty" to contribute can transform someone who never agreed

to contribute to a plan into an "employer" now responsible for MPPAA withdrawal liabilities.[6]

* * * *

This Court's review is therefore warranted to clarify who is an "employer" subject to withdrawal liability under MPPAA and to restore legal certainty in the face of an acknowledged conflict in the circuits so "that plans and plan sponsors [are] subject to a uniform body of benefits law" as Congress intended, *Ingersoll-Rand Co.*, 498 U.S. at 142.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 18, 2010

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[6] Indeed, the Court cited to legislative history indicating that Congress enacted MPPAA because "[s]ound national pension policy demands that employers *who enter into agreements* providing for pension contributions not be permitted to *repudiate their pension promises*." *Advanced Lightweight*, 484 U.S. at 548 n.15 (internal quotations omitted).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

No. 08-5949.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellants,

v.

INTERNATIONAL COMFORT PRODUCTS, LLC,
Defendant-Appellee.

Argued: March 10, 2009.
Decided and Filed: Oct. 23, 2009.
Rehearing and Rehearing En Banc
Denied Feb. 18, 2010.

Before: KETHLEDGE and WHITE, *Circuit Judges*; POLSTER, *District Judge*.*

KETHLEDGE, J., delivered the opinion of the court, in which POLSTER, D.J., joined. WHITE, J. (pp. 287-88), delivered a separate concurring and dissenting opinion.

OPINION

KETHLEDGE, *Circuit Judge*.

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee (col-

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* The Honorable Dan Aaron Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

lectively, the "Fund") appeal the district court's grant of summary judgment to International Comfort Products, LLC ("ICP") with respect to the Fund's claims for withdrawal liability under the Multiemployer Pension Plan Amendments Act ("MPPAA" or the "Act"), 29 U.S.C. §§ 1381 *et seq.*, and for breach of contract. We affirm as to the latter claim. The principal question presented as to the former is whether an entity need be *contractually* obligated to contribute to a pension fund, as opposed to obligated under applicable labor-management relations law, in order to be an "employer" for purposes of the MPPAA. Relying upon authority from other circuits, the district court held that the obligation must be contractual. We respectfully disagree with that authority, and thus vacate and remand as to the MPPAA claim.

I.

A.

ICP is a Delaware corporation that, during the period relevant to this case, manufactured heating and cooling products at a facility in Lewisburg, Tennessee. (We refer to ICP's predecessor entities also as "ICP"). In 1971, ICP entered into an agreement with Top Transportation Services, Inc. ("Top"), under which Top agreed to provide ICP with truck drivers for its Lewisburg operations. Under the agreement, Top paid the drivers' salaries and benefits, and then sought reimbursement for those costs, among others, from ICP. Accordingly, the relevant version of the agreement—executed in 1992 (the "Agreement")—provided that, on a weekly basis, "[Top] shall bill [ICP] its actual costs and expenses of operations hereunder . . . . Such costs and expenses shall include, but not be limited to, direct wages, salary payments,

payroll taxes and necessary fringe benefits, insurance and administration applicable to the operations." *Agreement* ¶ 3.

The Agreement also provided that Top "will . . . handle all labor relations and the negotiating of union contracts and shall enter into any and all labor contracts covering the drivers who are its drivers and are in the service of [ICP]." *Id.* ¶ 2. Per that provision, Top, but not ICP, was a signatory to collective bargaining agreements with Local Union No. 327 of the International Brotherhood of Teamsters. Those agreements required Top to make contributions to the Fund—which is a "multiemployer pension plan" as defined by the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(37)—on behalf of the drivers. During all periods relevant here, Top invoiced ICP for Top's contributions to the Fund, and ICP then reimbursed Top those amounts.

In February 2002, ICP terminated its agreement with Top, which in turn ceased all operations the following month. That cessation triggered withdrawal liability under the MPPAA, which the Fund assessed to be in the principal amount of $570,694.35. In letters dated April 30, 2002, the Fund demanded payment of the assessment from both Top and ICP. Top never paid the assessment—it was by then a defunct entity—but it did invoice ICP for the assessment amount. ICP paid neither the assessment nor the invoice.

The Fund sued Top in May 2003 and obtained a default judgment for the assessment amount that July. Top never paid the default judgment. In February 2005, however, Top executed an assignment of its rights under the Agreement to the Fund. The Fund thereafter brought this action against ICP,

asserting that ICP owed withdrawal liability under the MPPAA and that ICP breached its Agreement with Top—in whose shoes the Fund purported to stand—when it failed to pay Top's invoice for the assessment amount. The district court eventually granted summary judgment to ICP with respect to all of the Fund's claims.

This appeal followed.

II.

We review *de novo* a district court's decision granting summary judgment. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 489 (6th Cir.2004).

A.

1.

We turn first to the Fund's claim under the MPPAA. "Congress passed the MPPAA as an amendment to ERISA in order to protect multi-employer pension plans from the financial burdens that result when one employer withdraws from a multi-employer plan without first funding uncovered liabilities of the plan attributable to the employer." *Carriers Container Council, Inc. v. Mobile S.S. Assoc., Inc.-Int'l Longshoreman's Ass'n*, 896 F.2d 1330, 1342 (11th Cir. 1990). The Fund asserts its claim against ICP under § 1381(a) of the Act, which provides: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." Only an "employer," therefore, can be subject to withdrawal liability under the MPPAA.

"The MPPAA does not itself contain a definition of the word 'employer[,]'" *Carriers*, 896 F.2d at 1342, which has made the task of constructing one unavoida-

ble for the courts. All of the circuits to have addressed the issue, however, agree upon a common definition. That definition is "drawn from Title I of ERISA[,]" *id.* at 1343, whose definitions "do not apply elsewhere in the Act of their own force," but "may otherwise reflect the meaning of the terms defined as used in other Titles[.]" *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 371 n. 14, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). Title I of ERISA defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan[.]" 29 U.S.C. § 1002(5). Adapting that definition to the MPPAA context, four circuits have held that the term "employer," for purposes of the Act, means "a person who is *obligated to contribute* to a plan either as a direct employer or in the interest of an employer of the plan's participants." *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2d Cir.1989) (emphasis added); *see also Carriers*, 896 F.2d at 1343 (same); *Seaway Port Auth. of Duluth v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan*, 920 F.2d 503, 507 (8th Cir.1990) (same); *Central States, S.E. and S.W. Areas Pension Fund v. Central Transport, Inc.*, 85 F.3d 1282, 1287 (7th Cir.1996) (same).

This definition furthers the Act's purposes by "prevent[ing] a contributor to a plan from withdrawing its support without covering its share of unfunded liabilities." *Carriers*, 896 F.2d at 1343. The definition is also consistent with the structure of the Title I definition of employer. The Title I definition is different in kind from "the common law definition, which looks for direct employer-employee relationships (e.g., direct supervision, direct payment)." *Id.* Under Title I, the focus is instead upon the entity's "relation to an

employee *benefit plan*[.]" 29 U.S.C. § 1002(5) (emphasis added). And we agree that the relevant relation, for purposes of determining withdrawal liability under the MPPAA, is whether the entity had an obligation to contribute to the plan in the first place. Like the other circuits, therefore, we hold that "the contributing obligor definition drawn from Title I applies to the term 'employer' in section 1381(a)." *Carriers*, 896 F.2d at 1343.

2.

"Although we now have a definition of employer, we still must determine what that definition means[.]" *Seaway*, 920 F.2d at 508. And there we respectfully part company with several of our sister circuits. The Ninth Circuit has held, without explanation or citation to authority, that "[t]he word 'employer' describes one who was a *signatory* employer with respect to the plan." *H.C. Elliott, Inc. v. Carpenters Pension Trust Fund for N. California*, 859 F.2d 808, 813 (9th Cir. 1988) (emphasis added). The other two circuits to have addressed the issue—the Seventh and the Eighth—trace their holdings back to the Eighth Circuit's holding in *Seaway*. There, the court surveyed the fact patterns in five cases applying the contributing-obligor definition of employer, and found "one fact common to all of the parties held subject to withdrawal liability: *they were contractually bound to make pension contributions*, either in collective bargaining agreements, general cargo agreements, or shipping association agreements." *Seaway*, 920 F.2d at 509 (emphasis in original). "Thus, applying the relevant case law," the court held that the entity at issue there was not an MPPAA employer because it had not signed any contracts "explicitly obligating it to make pension contributions." *Id*

The Eighth Circuit reiterated its position in a case factually similar to this one, namely *Rheem Mfg. Co. v. Central States S.E. and S.W. Areas Pension Fund*, 63 F.3d 703 (8th Cir.1995). There, the court cited the "one fact common" passage from *Seaway*, and proceeded directly to hold: "The nature of the obligation to contribute establishing an entity as an 'employer' for MPPAA purposes, therefore, is *contractual*, and the party who is signatory to a contract creating the obligation to contribute is the 'employer' for purposes of establishing withdrawal liability." *Id.* at 707 (emphasis added). The Seventh Circuit applied that same rule a year later—without any analysis of its merits, or even expressly adopting it—in *Central Transport*, 85 F.3d at 1287. The Seventh Circuit thereafter expressly adopted that rule—but again without analysis of its merits—in *Transpersonnel, Inc. v. Roadway Express, Inc.*, 422 F.3d 456, 460 (7th Cir.2005). Thus, in the Seventh, Eighth, and Ninth Circuits, an entity's obligation to contribute must be "created by contract" in order for the entity to be an employer under the MPPAA. *Id.*

For several reasons, however, we respectfully disagree with that rule. As an initial matter, the rule's foundation, as demonstrated above, is merely the *Seaway* court's observation that, in five other cases where an entity was deemed an MPPAA employer, the entity's obligation to contribute was contractual in nature. With the exception of the Ninth Circuit's unsupported declaration in *H.C. Elliott*, however, none of the cases surveyed in *Seaway* held, or even intimated, that a contractual obligation to contribute is the *only* such obligation sufficient to trigger employer status under the Act. Those cases merely happened to involve contractual obligations. The Eleventh Circuit's careful opinion in *Carriers* is an example:

The court found that, under certain contracts, the subject carriers were obligated to contribute to the subject plan; and thus the court held straightaway that the carriers "are subject to withdrawal liability" under the Act. 896 F.2d at 1344. And having had so held, the court had no reason even to consider, much less adopt, the "contract-only" limitation thereafter inferred in *Seaway*. Thus, at most, the surveyed cases merely suggest that contractual obligations might be the most *common* type, and not the *only* type, of obligation to contribute among MPPAA employers. And even then, five cases is not much of a sample size.

More fundamentally, *Seaway* and its progeny take the courts' exercise in interstitial lawmaking a definition too far. It is true enough that the definition of employer for purposes of the MPPAA was left for the courts to construct. But the definition thus constructed asks whether the entity has an "obligation to contribute" to a plan; and *that* term is expressly defined by the MPPAA. Title 29 U.S.C. § 1392(a) provides:

> (a) "Obligation to contribute" defined
>
> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, *or*
>
> (2) *as a result of a duty under applicable labor-management relations law*, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(Emphasis added.)

Thus, rather than "apply the relevant case law," as in *Seaway*, our task should be simply to apply the statute. In § 1392(a) Congress has made unmistakably clear that, "[f]or purposes of" Part 1 of the MPPAA—which means for *all* such purposes, including a determination of withdrawal liability under § 1381, found in Part 1—an obligation to contribute to a plan may arise not only from a contract, but also from "applicable labor-management relations law[.]" 29 § U.S.C. 1392(a)(2). That definition stands before us as clear as day. And it is *that* definition—rather than one constructed in the dim light of common-law inference—that we are bound to apply.

The Supreme Court has specifically held as much. In *Laborers Health and Welfare Trust Fund for N. California, et al. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988)—a case apparently overlooked by the courts adopting the contract-only definition of contributing obligor—the Supreme Court directly addressed the meaning of "obligation to contribute" for purposes of Part 1 of the MPPAA. Observing that withdrawal liability "arises when an employer ceases to have an 'obligation to contribute' to the plan[,]" the Court declared: "That term is defined for the purposes of the withdrawal liability portion of the statute in language that *unambiguously includes* both the employer's contractual obligations *and any obligation imposed by the NLRA* [which the Court equated with applicable labor-management relations law]." *Id.* at 545-46, 108 S.Ct. 830 (emphasis added). Adding a double-knot for good measure, the Court stated that the § 1392(a) "definition is significant because it demonstrates that Congress was aware of the *two different sources of an employer's duty to contribute* to covered plans." *Id.* at 546, 108 S.Ct. 830 (emphasis

added); *see also id.* at 549 n. 16, 108 S.Ct. 830 ("withdrawal liability may arise from *either* a contractual duty *or* a statutory duty, see [§ 1392(a)]") (emphasis added).

The mere accumulation of contrary precedent in three other circuits does not, in our view, give us license to disregard the plain language of § 1392(a) or the Supreme Court's equally plain interpretation of it. *Cf. In re Sealed Case*, 310 F.3d 717, 725-27 (FISA Ct. Rev.2002) (describing, and rejecting, a similar snowballing of precedent unconnected to the "*actual* statutory language" at issue) (emphasis in original). If an obligation to contribute is the touchstone of employer status under the MPPAA—and we agree that it is—then the dictates of the statute and Supreme Court alike compel the conclusion that employer status may arise from not only a contractual obligation, but also an obligation "under applicable labor-management relations law[.]" 29 U.S.C. § 1392(a)(2).

The Fund has contended throughout this litigation that ICP had the latter obligation. The district court did not reach that contention, however, because it followed *Seaway* and thus considered only whether ICP had a contractual obligation to contribute to the Fund. Per our holding today, we vacate the court's judgment with respect to the Fund's MPPAA claim, and remand for a determination whether ICP had an obligation to contribute to the Fund "under applicable labor-management relations law[.]" *Id.* The question whether that determination can be made only by the National Labor Relations Board, as ICP suggests in its brief, we leave for the district court to answer in the first instance.

B.

The Fund's claim for breach of contract is more easily handled. The claim rests on two grounds. First, the Fund argues that the subject withdrawal liability was a cost of Top's operations—it does, after all, represent essentially an underpayment of Top's obligation to contribute to the Fund during the relevant period of Top's operations—and that ICP therefore owes Top (and the Fund itself, as Top's assignee) the amount of the liability. ICP counters, and the district court agreed, that a liability which by definition arises upon the *cessation* of operations cannot be a "cost" of them. We need not resolve that particular dispute, however, because the Agreement obligates ICP to reimburse Top only for Top's "*actual* costs" of operation, *Agreement* ¶ 3; and costs never paid are not actual. Top never paid any withdrawal liability, so it was not entitled under the Agreement to seek reimbursement for the assessed amount. And thus so too neither is the Fund.

Second, the Fund argues that, under the Agreement's indemnification clause, ICP is obligated to indemnify Top (and thus again the Fund as its assignee) for the amount of Top's withdrawal liability. *See Agreement* ¶ 5. We entirely agree with the district court that, when read as a whole, this section of the Agreement required ICP to indemnify Top for "vehicle liability"—basically, liability arising from trucking accidents—rather than withdrawal liability under the MPPAA.

The district court's judgment with respect to the Fund's claim for breach of contract is affirmed. The court's judgment with respect to the Fund's claim under the MPPAA is vacated and remanded for proceedings consistent with this opinion.

WHITE, Circuit Judge, concurring and dissenting.

I join in the majority opinion except for section II.B. I would reverse and remand the contractual claim based on § 3 of the Agreement.[1] Unlike the majority, I do not interpret the phrase "actual costs and expenses of operation" to unambiguously provide that "costs" for which Top became liable as the result of its operations under the contract with ICP, but did not pay, are not "actual costs."

The word "actual" means "real." In this context, "real" or "actual" could mean the actual amount of the costs and expenses as contrasted with the actual amount plus a percentage markup for services, or an additional markup for overhead. This is a common usage of the term actual. For example, a provision of the Bankruptcy Code allows court-appointed trustees of bankrupt estates to recoup "actual, necessary expenses." 11 U.S.C. § 330(a)(1)(B). Federal courts interpreting that language have distinguished "actual" expenses not from unpaid expenses, but from "estimated" expenses, as well as from general overhead expenses not attributable to any one account. *See generally*, James Lockhart, Annotation, *What Expenses Qualify for Reimbursement Under Bankruptcy Code Provision Allowing Reimbursement to Trustees, Examiners, and Professional Persons for Actual, Necessary Expenses (11 U.S.C.A. § 330(a)(1)(B))*, 169 A.L.R. Fed. 197 (2001).

Absent evidence of an alternate meaning between the parties, a reasonable interpretation of the phrase "actual costs and expenses" in the Agreement is that

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[1] I concur in the affirmance of the district court's grant of summary judgment dismissing plaintiffs' contract claim based on § 5 of the Agreement.

it served to make similar distinctions as those in other business interactions, and not to disqualify incurred but unpaid liabilities. *Cf. In re Washington Mfg. Co.*, 101 B.R. 944, 956 (Bankr.M.D.Tenn.1989) (stating that "actual, necessary expenses" are expenses that are "incurred").

Further, the fact that withdrawal liability is not mentioned in the contract is not dispositive. The contract clearly provided that costs and expenses shall include, but not be limited to, the enumerated items. It is undisputed that over the course of the thirty-year relationship, Top billed ICP for, and ICP paid, the ongoing pension cost and expense. Further, ICP and Top visited the issue in 1994, when ICP cut back on the number of drivers supplied by Top. At that time, Top informed ICP of its potential withdrawal liability. ICP responded that it had obtained an opinion from counsel that "no liability will be incurred by [ICP] as a result of the downsizing." Although the district court interpreted this as ICP's assertion that withdrawal liability was not an obligation of ICP, it can also be understood as a statement that ICP believed that the anticipated downsizing would not trigger withdrawal liability, and a tacit acceptance of the underlying assertion that ICP might have withdrawal liability under the Agreement under different circumstances. Indeed, it is not asserted that the downsizing triggered such liability. If it had, no doubt Top would have billed ICP.

Because § 3 of the Agreement is not unambiguous as applied to this situation, and the surrounding circumstances create a genuine issue of material fact as to ICP's and Top's intent, I would reverse the grant of summary judgment and remand for further proceedings on this issue as well.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:07-0383
District Judge Trauger

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, Trustee,
Plaintiffs,

v.

INTERNATIONAL COMFORT PRODUCTS, LLC,
a Delaware limited liability company,
Defendant.

MEMORANDUM

The plaintiffs have filed a Motion for Summary Judgment (Docket No. 37), to which the defendant has responded (Docket No. 49), and the plaintiffs have replied (Docket No. 50). In addition, the defendant has filed a Motion for Summary Judgment (Docket No. 38), to which the plaintiffs have responded (Docket No. 44), and the defendant has replied (Docket No. 52). For the reasons cited herein, the plaintiffs' motion will be denied, and the defendant's motion will be granted.

I. Introduction

This is an action for collection of withdrawal liability,[1] interest, and penalties allegedly incurred by Defendant International Comfort Products, LLC ("ICP") as a result of a withdrawal from a multiemployer pension plan. The plaintiffs (also referred to as "Central States," "the "Fund" or "the Pension Fund") bring this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1001, *et seq*. The plaintiffs allege that the defendant and Top Transportation Services, Inc. ("Top") are jointly and severally liable for the withdrawal liability owed to the Pension Fund in the amount of $558,499.35.

The Pension Fund seeks to collect over $1 million under three alternative claims: (1) that ICP is liable under the withdrawal liability provisions of ERISA, 29 U.S.C. § 1001, *et seq*., as amended by the MPPAA, 29 U.S.C. § 1381, *et seq*., as a result of Top's withdrawal from the Fund; (2) that ICP is liable for withdrawal liability pursuant to the common law doctrine of equitable assignment and because the Fund was a third-party beneficiary of the CBA and/or the ICP Agreement; and (3) that ICP is liable for withdrawal liability pursuant to a 1992 contract between ICP and Top ("the 1992 Agreement").

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[1] "Withdrawal liability is the amount owed a pension plan by an employer which reduces or ceases its plan contributions prior to fully funding the liabilities of the plan attributable to the employer." *Transpersonnel, Inc. v. Roadway Express, Inc.*, 422 F.3d 456, 459 (7th Cir. 2005)(citing 29 U.S.C. §§ 1383, 1385).

The defendant now moves to dismiss the plaintiffs' claims, contending that (1) ICP was neither a signatory to any contract with a union or with the Fund, nor a member of Top's controlled group of businesses, and is thus not subject to withdrawal liability under the statute; (2) ICP is not subject to withdrawal liability under any common law doctrine because Congress expressly provided for preemption of state law as well as a detailed statutory scheme for withdrawal liability under the MPPAA, leaving the Fund's common law claim non-viable as a matter of law; and (3) ICP is not subject to withdrawal liability under the 1992 Agreement because (a) that contract never obligated ICP to pay Top for any withdrawal liability, and (b) the Fund's contract claim, which depends on a 2005 assignment by Top to the Fund, is not actionable as a result of an Illinois corporation law statute of repose.

ICP has not disputed that the court has jurisdiction over these claims under Sections 502(e), 502(f), and 4301(c) of ERISA, 29 U.S.C. §§ 1132(e), 1132(f) and 1451(c), as well as under 28 U.S.C. §§ 1331, 1337, and 1364.

II. Facts

The following facts are taken from the parties' Rule 56 statements and responses thereto and are undisputed unless otherwise noted. The Fund is a multiemployer pension plan within the meaning of 29 U.S.C. § 1301(a)(3). Howard McDougall is the Trustee of the Fund. The Fund and McDougall are referred to collectively as the plaintiffs.

ICP is a Delaware limited liability company engaged in the distribution of manufactured products in Lewisburg, Tennessee. ICP is a successor to busi-

ness operations bearing the names, in succession, Heil-Quaker Corporation, Inter-City Products Corporation (USA), and International Comfort Products Corporation (USA). For purposes of this Memorandum, all such named entities may from time to time be referred to collectively as "ICP." ICP was never party of Top's controlled group as described in 29 U.S.C. § 1301(b).

In 1971, Heil-Quaker Corporation ("Heil-Quaker") entered into a contract whereby Top supplied truck driver services[2] to Heil-Quaker for the purpose of moving Heil-Quaker's products from one location to another, initially from the manufacturing plant in Lewisburg, Tennessee to a warehouse about 60 miles away in LaVergne, Tennessee. The 1971 contract provided that Heil-Quaker would pay Top for the costs of operations of the drivers employed by Top whose services were provided to Heil-Quaker. The 1971 contract provided in Section (3):

> (3) OPERATOR [Top] shall bill HEIL-QUAKER its actual costs and expenses of operation hereunder plus an amount equal to ten percent (10%) thereof as an operating margin. Such costs and expenses shall include, but not be limited to, direct wages, salary payments, payroll taxes and necessary fringe benefits, insurance and administration applicable to the operations.

(Ex. 1 to Docket No. 37)(hereinafter "the 1971 Agreement").

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[2] The parties dispute the characterization of the services provided by Top to ICP. (*See* Plfs.' Resp. to Def.'s Stmt. of Undisputed Facts, Docket No. 45, p. 6 ¶ 19). This dispute is not material to the issues in this case.

During all relevant times after 1971, Top was signatory to a collective bargaining agreement with Teamsters Union Local No. 327 covering Top's drivers. Each succeeding collective bargaining agreement obligated Top to contribute to the Fund on behalf of the drivers to provide them with pension benefits in accordance with the collective bargaining agreement. At no time did Heil-Quaker or its successors enter into a contract with the Teamsters Union or with Central States. As part of the services it provided ICP, Top invoiced ICP for pension contributions, ICP paid the invoice, and then Top remitted the contributions to the Pension Fund.

Over the years, the Heil-Quaker business changed its name several times as described above. Top and Inter-City Products Corporation (USA) (f/k/a Heil-Quaker) signed a 1992 contract which was the successor to the 1971 contract between the same entities. The 1992 contract contained a Section (3) that was similar to Section (3) of the 1971 contract:

> (3) OPERATOR [Top] shall bill COMPANY [ICP] its actual costs and expenses of operation hereunder plus a weekly service charge of $35.00 per employee. Such costs and expenses shall include, but not be limited to, direct wages, salary payments, payroll taxes and necessary fringe benefits, insurance and administration applicable to the operations.

(Ex. 2 to Docket No. 37)(hereinafter "the 1992 Agreement"). In a different section, the 1992 Agreement provides:

> COMPANY [ICP] further agrees to indemnity [sic] and save OPERATOR [Top] from real or asserted liability, including cost of defense,

> connected with or resulting from the ownership, custody, maintenance, use or operation of the vehicles and/or equipment hereunder, which liabilities are not covered by the insurance provided by COMPANY [ICP], or if the covered [sic] are in excess of the policy limits.

(1992 Agreement, § 5).

The only individual to provide evidence concerning the execution of the 1992 Agreement was Robert Henningsen, who was ICP's Vice President of Human Resources and Administration and who signed the contract in Tennessee on behalf of ICP. (Ex. 1 to Docket No. 40, Henningsen Dep. at 11, 41). Henningsen testified by deposition that, although he was aware of ERISA withdrawal liability prior to 1992, the notion of withdrawal liability was not discussed in the period leading up to the signing of the 1992 Agreement and was not otherwise associated with that contract. (Henningsen Dep. 41-42).

In late 1994, ICP began considering the relocation of its LaVergne distribution facility to Lewisburg in order to shorten the distance between the plant and the distribution center and to save money. Henningsen testified that, during a 1994 visit to his Nashville office, Top officials raised "pension liability issues" with him "based on their own research recently conducted, that a reduction in force [would] 'trigger' a liability created as a result of Teamsters pension plan's unfunded but vested liability." (Letter, Ex. 40 to Docket No. 40; Henningsen Dep. at 44-46). Henningsen thereafter wrote a letter to his legal counsel dated December 28, 1994, questioning Top's suggestion that withdrawal liability might extend to ICP and seeking counsel's input. (*Id.*)

On April 19, 1995, Henningsen wrote to Edward Wilkinson, Top's President, regarding "Inter-City Products/Teamster Pension Withdrawal Liability." (Letter, Ex. 27 to Docket No. 40). Henningsen stated that, after reviewing the matter with counsel, ICP's position was that "no liability will be incurred by Inter-City as a result of the downsizing of its transportation needs due to the relocation of its physical distribution center." (*Id.*)

Business operations changed in late 1995 in that the LaVergne distribution facility was moved to Lewisburg right across the street from the Lewisburg plant. At that time, ICP no longer required over-the-road trucking services from Top drivers. Instead, fewer Top drivers were needed to move the products a few hundred yards between ICP's two facilities.

Beginning in 1998, Top underwent some ownership changes, culminating in the sale of Top's stock and its affiliates to The Meritas Group LLC, which was owned by Robert Rousseau and his sister. On November 1, 2000, the Illinois Secretary of State dissolved Top for its failure to file its annual reports and failure to pay its franchise tax.

In August 1999, Carrier Corporation acquired the stock of International Comfort Products Corporation (USA) and eventually changed its name to International Comfort Products, LLC. By letter dated November 7, 2001, Doug McKay, ICP's materials manager in Lewisburg, gave Top 90 days' notice of termination of the 1992 Agreement, which then terminated on February 5, 2002. Top thereupon terminated its drivers who had been working at ICP's facilities. By April 2002, not only was the contract terminated, but Top had ceased business operations.

The Fund treated Top's termination of the drivers as a "withdrawal" from the Fund and issued notices in April 2002 to collect withdrawal liability from Top, Top's controlled group members, and ICP. The Fund then sued Top for the withdrawal liability and obtained a default judgment against Top in federal court in Illinois on July 3, 2003. The Fund then sued Top's controlled group affiliates and, on March 31, 2004, obtained a judgment by default against Employee Benefits & Business Services, Inc. and Professional Employer Management Services, Inc.

The Fund also obtained a consent judgment on February 18, 2005 against The Meritas Group, LLC, Meritas Group Enterprises, Inc., and Meritas PEO, LLC, all of whom were members of Top's controlled group. In connection with that consent judgment, on February 18, 2005, Rousseau signed an Assignment, transferring[3] to the Fund Top's rights under the 1992 Agreement with ICP, which was terminated February 5, 2002. On April 10, 2007, the Fund filed the instant action against ICP.

III. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To prevail, the moving party must meet the burden of proving the absence of a genuine issue of material

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[3] The parties dispute whether this Assignment was valid and enforceable. (*See* Def.'s Resp. to Plfs.' Stmt. Undisputed Facts, Docket No. 48 ¶ 170).

fact as to an essential element of the opposing party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir. 2001).

In determining whether the moving party has met its burden, the court must view the factual evidence and draw all reasonable inferences in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). "The court's function is not to weigh the evidence and determine the truth of the matters asserted, 'but to determine whether there is a genuine issue for trial.'" *Little Caesar Enters., Inc. v. OPPCO, LLC*, 219 F.3d 547, 551 (6th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

If the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which she has the burden, however, the moving party is entitled to summary judgment as a matter of law. *See Williams v. Ford Motor Co.*, 187 F.3d 533, 537-38 (6th Cir. 1999). To preclude summary judgment, the nonmoving party "must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 566 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 252). If the evidence offered by the nonmoving party is "merely colorable," or "not signifi-

cantly probative," or not enough to lead a fair-minded jury to find for the nonmoving party, the motion for summary judgment should be granted. *Anderson*, 477 U.S. at 249-52. "A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Hill v. White*, 190 F.3d 427, 430 (6th Cir. 1999) (citing *Anderson*, 477 U.S. at 247-49).

When the party bearing the burden of persuasion at trial moves for summary judgment, it faces a "substantially higher hurdle," and must show that the evidence is so powerful than its entitlement to summary judgment is "beyond a reasonable doubt." *Cockrel v. Shelby Country Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001).

IV. Analysis

Congress enacted ERISA in 1974 to reassure employees who had been promised a pension benefit upon retirement that they would receive it. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 213-14 (1986). However, Congressional studies revealed that "the preexisting pension plan termination program, enacted as [T]itle IV of [ERISA], perversely operated to provide employers with an incentive to withdraw from financially weak plans." *I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 416 (D.C. Cir. 1987). In addition, the statute did not adequately address the adverse consequences that occur when an employer withdraws from a multi-

employer pension plan.[4] *See Pension Benefit Guar. Corp. v. R.A. Gray*, 467 U.S. 717, 723 (1984).

In response to these and other problems, six years later Congress amended ERISA by enacting the MPPAA, which requires employers who withdraw, completely or partially, from a multiemployer pension plan to contribute to the plan a proportionate share of the unfunded, vested benefits. *R.A. Gray*, 467 U.S. at 725. The MPPAA "imposes liability on an employer withdrawing from a multiemployer pension plan in order to ensure that the withdrawing employer does not leave a plan with vested pension obligations that are only partially funded." *Transpersonnel Inc. v. Roadway Express, Inc.*, 422 F.3d 456, 460 (7th Cir. 2005). "The concept of withdrawal liability attempts to avoid a situation in which the financial burden of funding vested pension benefits is shifted onto other

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[4] As noted by the Court in *R.A. Gray*:

> A key problem of ongoing multiemployer pension plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

467 U.S. 717, 723 n.2 (quoting Pension Plan Termination Insurance Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978)(statement of Matthew M. Lind, Executive Director of the Pension Benefit Guaranty Corporation)).

employers participating in the multiemployer plan and, ultimately, to the Pension Benefit Guaranty Corporation." *Id*

A. Count I: Withdrawal Liability under ERISA and the MPPAA

In the instant case, the Fund claims that ICP is liable as an employer and/or joint employer under ERISA and the MPPAA for withdrawal liability owed to the Pension Fund. ICP argues that it is not subject to any statutory liability incurred by Top, as it was neither an "employer" for MPPAA purposes nor otherwise obligated to contribute to the Fund.

The pertinent portion of the MPPAA provides: "If an employer withdraws from a multiemployer pension plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a). The MPPAA contains no definition of "employer." Courts determine whether an entity is an "employer" subject to withdrawal liability. *See Rheem Mfg. Co. v. Central States Pension Fund*, 63 F.3d 703, 706 (8th Cir. 1995)(noting that MPPAA provides no definition and relying on Eighth Circuit precedent establishing a definition of "employer"). This determination is properly addressed by the district court before the arbitration of any remaining issues. *Mason & Dixon Tank Lines, Inc. v. Central States Pension Fund*, 852 F.2d 156, 167 (6th Cir. 1988).

Although the Sixth Circuit has not addressed this issue, other Circuits have done so. Those courts have held that withdrawal liability requires an express, contractual obligation to contribute to the pension plan in question. In *Rheem*, the Eighth Circuit joined

the Second and Eleventh Circuits in holding that, for MPPAA purposes, the definition of employer is "'a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants.'" 63 F.3d at 706 (quoting *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2d Cir. 1989); *Carriers Container Council, Inc. v. Mobile Steamship Ass'n-Int'l Longshoreman's Ass'n, AFL-CIO Pension Plan & Trust*, 896 F.2d 1330, 1343 (11th Cir. 1990)). "In applying this definition," the Eighth Circuit held, "the appropriate inquiry is whether the alleged employer had an obligation to contribute and what was the nature of that obligation." *Id.* (quotation omitted).

The Eighth Circuit found, after reviewing the case law applying this definition of "employer" under the MPPAA, that there was "one fact common to all of the parties held subject to withdrawal liability; *they were contractually bound to make pension contributions*, either in collective bargaining agreements, general cargo agreements, or shipping association agreements." *Id.* at 706-07 (quoting *Seaway*, 920 F.2d at 508)(emphasis in original). The *Rheem* Court then concluded: "The nature of the obligation to contribute establishing an entity as an 'employer' for MPPAA purposes, therefore, is contractual, and the party who is signatory to a contract creating the obligation to contribute is the 'employer' for purposes of establishing withdrawal liability." *Id.* at 707.

In applying these findings, the Court held as a matter of law that the lessee of drivers, in a position similar to ICP, was not contractually obligated to contribute under the plan and not subject to withdrawal liability. *Id.* at 707. The Court noted that

Knight (the lessor), not Rheem (the lessee), was contractually bound to make payments to the pension fund; that Knight, not Rheem, signed the collective bargaining agreement creating the obligation to contribute to the fund; that Knight, not Rheem, signed the trust agreement with the fund creating the obligation to make payments to the fund. *Id.* The Court noted that Central States had not produced any document "that could create a contractual obligation for Rheem to contribute to Central States." *Id.*

More recently, in *Transpersonnel Inc. v. Roadway Express, Inc.*, 422 F.3d 456 (7th Cir. 2005), a lessor of drivers sought a declaratory judgment that the lessee was an "employer" of the leased drivers for purposes of potential withdrawal liability. *Id.* at 458. The lessor argued that *Rheem* was distinguishable in that Roadway, the lessee in *Transpersonnel*, was contractually obligated to reimburse the lessor for contributions to the plan. *Id.* at 459. The district court agreed. *Id.* However, the Seventh Circuit specifically rejected that argument and held that "Roadway's reimbursement obligation" did not "take the case outside the core holdings of *Central Transport* and *Rheem*." *Id.* at 461. The Court explained that, "the obligation to *reimburse* for contributions made by another is not the equivalent of an obligation to *contribute* in the first instance." *Id.* (emphases in original). "This distinction," said the Court, "is important for purposes of Central Transport's definition of 'employer' under the MPPAA." *Id.*

In *D.C. Transp. Servs., Inc. v. Coca-Cola Bottling Co. of N. Ohio*, 853 F. Supp. 1002, (N.D. Ohio 1994), after noting that the Sixth Circuit had not yet defined "employer" under the MPPAA, the district court adopted the Second Circuit's construction of the

term "employer" as used in the MPPAA. *Id.* at 1010 & n.29 (finding the Second Circuit's definition "more helpful than what is found in Section 1002(5) [sic]). In that case, a leasing contract existed between Commercial Drivers, a lessor of trucks and related personnel, and the lessee CCB, with the leased drivers subject to collective bargaining agreements requiring pension contributions. CCB's termination of the contract triggered withdrawal liability. Pursuant to the terms of the leasing contract, Commercial Drivers prevailed at commercial arbitration on the issue of whether CCB was contractually obligated[5] to indemnify Commercial Drivers for the withdrawal liability.

In applying the Second Circuit's definition of "employer" under the MPPAA and examining the terms of the lease agreements between the parties, the district court found that "the obligation to make pension contributions fell to the employer and the employer *was signatory to the CBA's.*" *Id.* at 1011 (emphasis added). The court further found that, "[h]ad Commercial Drivers [the lessor] refused or failed to make such contributions, the FUND would not have been able to force CCB or [codefendant]

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[5] The court carefully emphasized the differences between a statutory obligation to pay withdrawal liability under the MPPAA and a contractual obligation to pay withdrawal liability under a contract's indemnification clause. *See* 853 F. Supp. 1002, 1008 (pointing out that ABARTA has never been found to be an MPPAA "employer"; rather its liability is contractual in nature: "These hairline distinctions are very important here.") & 1012 n.33 ("The Court notes that a determination that CCB and ABARTA are not 'employers' within MPPAA is not a determination that they completely escape liability. ABARTA clearly has a duty to indemnify under the terms of its leasing agreement; CCB arguably has the same duty.").

ABARTA to make them" because CCB's and ABARTA's obligations arose solely from an indemnification clause in the lease agreement. *Id.* "That obligation," said the court, "was an obligation to indemnify Commercial Drivers for the amounts contributed to the FUND, not to contribute directly to the FUND." *Id.*

Here, although the parties raise factual disputes as to whether ICP was the actual employer of Top's drivers, it is undisputed that Top, not ICP, signed a series of collective bargaining agreements with the Teamsters union obligating Top to contribute to the Fund on behalf of the drivers. ICP never signed a collective bargaining agreement. Top, not ICP, signed a series of participation agreements obligating Top to contribute to the Fund. ICP was never a signatory to any document obligating it to contribute to the Fund. ICP was never part of Top's controlled group. The court's review of the record simply does not reveal any contracts ICP signed "explicitly obligating it to make pension contributions." *Rheem*, 63 F.3d at 707. In all respects, Top was the only party "obligated to contribute under the plan."

The court therefore finds that, because ICP was not a signatory to any agreement obligating it to contribute to Central States, it was not an employer subject to the withdrawal liability incurred by Top. ICP is not liable for Top's statutory obligation, if any, for which the Fund claims over $1 million in withdrawal liability, interest, penalties, and attorney's fees.

The Fund attempts to persuade the court that *Transpersonnel* and *Rheem* were wrongly decided and, despite ICP's non-signatory status, ICP should be held liable for Top's withdrawal liability because ICP was the "actual" employer of Top's truck drivers.

(Docket No. 37 at 10). The Fund's argument is not well-taken. The court agrees with the appellate courts' reasoning as set forth in the *Rheem* and *Transpersonnel* decisions and finds that adopting their approach helps effectuate Congress' intent of creating a uniform body of federal employee benefits law. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657 (1995)(noting that, in enacting ERISA, Congress intended to ensure that plans and plan sponsors would be subject to a uniform body of federal employee benefits law).

The Fund next argues that ICP is liable for withdrawal liability because ICP was a joint employer and, as such, had an obligation to contribute to the Pension Fund under labor law pursuant to 29 U.S.C. § 1392(a). It is the plaintiffs' position that the broad definition of "employer" under Title I of ERISA encompasses the legal theory of "joint employer" liability as recognized in other non-ERISA labor management statutes. The plaintiffs insist that ICP and Top were joint employers because "ICP exercises sufficient control over the drivers." (Docket No. 37 at 12). Therefore, urge the plaintiffs, under 29 U.S.C. § 1392(a), ICP—as joint employer with Top—is liable for the withdrawal liability.

The MPPAA withdrawal liability provision, specifically § 4212 of ERISA, provides:

> (a) "Obligation to contribute" defined
>
> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

29 U.S.C. § 1392.

Even assuming for purposes of this decision that Top and ICP were joint employers at all times relevant to this action,[6] and accepting that the "the definition of 'employer' is more broad under Title I of ERISA than under Title IV, '[c]ourts presented with the issue [nevertheless] have generally refused to expand the definition of employer under [Title I of] ERISA to include entities which were not a party to the collective bargaining agreement under which suit is brought.'" *Schembre v. New Constr. Res., LLC*, 2006 WL 1134474, at *4 (E.D. Miss. Apr. 25, 2006) (quoting *Xaros v. U.S. Fid. and Guar. Co.*, 820 F.2d 1176, 1179 (11th Cir. 1987)). That is to say, "[n]umerous courts agree that a party must be a signatory to the collective bargaining agreement before it will be held responsible for delinquent contributions under § 1145, regardless of whether it was a joint employer." *Schembre*, 2006 WL 1134474, *4 (citing *Sun Chem. Corp. v. Int'l Bhd. of Teamsters Local No. 705*, 1992 WL 133175, at *3 (N.D. Ill. June 11, 1992)); *Ironworkers Local Union No. 808 v. Sicilia*, 45 F. Supp.2d 1332, 1334 (M.D. Fla. 1999); *Solomon v. Klein*, 770 F.2d 352, 354 (3d Cir. 1985); *Cariaga v. Local No. 1184 Laborers*, 154 F.3d 1072, 1075 (9th Cir. 1998); *Bleilier v. Cristwood Constr., Inc.*, 72 F.3d 13 (2d Cir. 1995); *Greenblatt v. Delta Plumbing & Heating Corp.*, 68 F.3d 561 (2d Cir.

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[6] This issue is hotly disputed by the parties. (*See, e.g.*, Docket No. 49 at 7-8).

1995)). These courts have found that joint employer liability under ERISA was inconsistent with case law concerning Section 515 liability. *See Transpersonnel*, 422 F.3d 456 ("employer" does not include joint employers with noncontractual obligations to contribute to pension plans); *Rheem*, 63 F.3d 703, 707 (to be liable, joint employer must be signatory to CBA); *Olivieri v. P.B.M. Constr.*, 383 F. Supp.2d 393, 404-405 (E.D. N.Y. 2005)("there is no authority warranting the imposition of liability on a joint employer which did not sign the relevant collective bargaining agreement [and] where there are no allegations of fraud or piercing the corporate veil."); *Greater New York Benefit Fund v. Verrazano Staffing, Inc.*, 2007 WL 1480777, at *2 (E.D. N.Y. Mar. 28, 2007) (agreeing with *Olivieri* court's reasoning and finding that "the joint employer theory of liability is not viable in [the Second] Circuit absent allegations of fraud or piercing the corporate veil."). The court agrees with and adopts the sound reasoning of these courts.

The plaintiffs point out that the National Labor Relations Board ("NLRB") has determined that a joint employer may be obligated to contribute to a fund under the National Labor Relations Act, even if the joint employer has not signed a collective bargaining agreement. (Docket No. 37 at 13). Even so, there has not been any such NLRB finding here. Moreover, the court is not persuaded that, even if the plaintiffs were to show joint employer status under labor law, a non-signatory should be liable for a signatory's withdrawal liability under ERISA and the MPPAA. Appellate court decisions such as *Transpersonnel* and *Rheem* expressly hold that to trigger withdrawal liability under the MPPAA there must be an express contractual obligation binding a party to

make contributions to the pension fund at issue. There is no such obligation here.

It is not necessary for this court to analyze the cases holding that non-signatory entities are liable for delinquent contributions under § 1145 because they are "alter egos," "single employers," or "successive employers" of the employer who is the signatory of the collective bargaining agreement. *See Schembre*, 2006 WL 1134474, at *4 n.3. The plaintiffs here make no such allegations against the defendant in their Amended Complaint. For the reasons explained above, the plaintiffs' joint employer theory also fails.

In conclusion, the court finds that Count I must be dismissed because withdrawal liability under § 1383(a) requires an express contractual obligation to contribute to the pension plan at issue, and ICP is not contractually obligated by the 1992 Agreement to contribute to the Pension Fund, whether ICP was an actual employer or joint employer of the Top drivers.

B. Count II: Common Law Claim

In Count II, the Fund argues that ICP is liable to the Fund for the withdrawal liability under the doctrine of equitable assignment and because the Pension Fund was an intended beneficiary of the ICP Agreement and/or collective bargaining agreement. In this claim, the Fund seeks over $1 million.

ERISA provides for a broad preemption of state laws in disputes related to ERISA plans. 29 U.S.C. § 1144; *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1980)(ERISA has "deliberately expansive" preemption provisions"). The Sixth Circuit has "repeatedly recognized that virtually all state law claims relating to an employee benefit plan are preempted by ERISA." *Cromwell v. Equicor-Equitable*

HCA Corp., 944 F.2d 1272, 1276 (6th Cir. 1991) (where Fund attempted to collect withdrawal liability in federal lawsuit based on state and federal common law theories, court rejected the state law claims as preempted by ERISA).

The instant action was brought by an ERISA plan. It names as defendant a party against whom the plan has never obtained any judgment. It is driven by the failure of an employer and the defendant to pay withdrawal liability to the plan pursuant to specific ERISA provisions. *See Central States v. Mahoning Nat'l Bank*, 112 F.3d 252, 256 (6th Cir. 1997). Just as the Sixth Circuit found the fund's state law claims in *Mahoning* to be "poorly disguised ERISA withdrawal liability claims," this court so finds the Fund's claims. *Id.* Therefore, the plaintiffs' common law claims, if construed as brought under state law, are preempted by ERISA. The defendant's Motion for Summary Judgment as to any state common law claims will be granted.

Federal law only rarely permits common law causes of action and, even then, only if the statute is silent or ambiguous. *Mahoning Nat'l Bank*, 112 F.3d at 257. The Sixth Circuit has repeatedly made clear that federal common law has limited application in the ERISA area. In *Mahoning Nat'l Bank*, the Court explained:

> [A]t least in the area of ERISA, federal common law is a little like a parasite—it cannot exist in the absence of a statutory host to which to cling. To date, this circuit has been vigilant in confining the federal common law to its symbiotic existence, recognizing that it can neither provide an independent source of rights with regard to

> employee benefit plans nor substitute for the remedies authorized by the ERISA statute . . . .

Id. at 256-57; *see Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 92 (6th Cir. 1997)("federal common law is developed under ERISA only in those instances in which ERISA is silent or ambiguous"); *Tassinare v. Am. Nat'l Ins. Co.*, 32 F.3d 220, 224-25 (6th Cir. 1994)("where it cannot be said that federal common law is essential to the promotion of fundamental ERISA policies, the plaintiffs may avail themselves only of those remedies authorized by statute"); *Flacche v. Sun Life Assur. Co.*, 958 F.2d 730, 735 (6th Cir. 1992)(refusing to review the definition of the term "fiduciary" under common law because ERISA expressly defines it). *But see Greenwood Mills, Inc. v. Burris*, 130 F. Supp.2d 949, 958 (M.D. Tenn. 2001) (Trauger, J.)(developing and applying federal common law where ERISA is silent as to the identity of the parties who can be liable for violations of § 1132(a)(3)).

In this case, Congress has not been silent or ambiguous about withdrawal liability. To the contrary, Congress has enacted a comprehensive set of rules for determining when a withdrawal from a multiemployer plan occurs, who is liable in that event, and how much liability that party incurs. 29 U.S.C. § 1381 *et. seq.* Those rules, as interpreted by the courts, are clear: absent exceptions not present here, only signatories to contracts requiring contributions to pension funds are liable for withdrawal liability. The plaintiffs cannot invoke common law to do what ERISA itself does not permit.

Also as part of their common law claim, the plaintiffs advance three distinct third-party beneficiary theories. First, the plaintiffs claim that the

Pension Fund was an intended beneficiary of the collective bargaining agreements between Top and Teamsters. Second, the plaintiffs claim that the Pension Fund was a third-party beneficiary of the ICP Agreement because ICP agreed to pay the contribution obligations to the Pension Fund. Third, the plaintiffs claim ICP was a third-party beneficiary under the collective bargaining agreements.

It is settled law that for a third party beneficiary rule to apply, the parties to the contract in question must intend for the third party status to arise. *WYCQ, Inc. v. Nat'l Music Mktg., Inc.*, 2008 WL 56027, at * 12 (M.D. Tenn. Jan. 3. 2008)("The third-party beneficiary rule permits a third party to sue to enforce a contract if it demonstrates that it was an intended beneficiary of a valid contract."). Here, there is no evidence that the Fund was intended to be a third party beneficiary of the ICP Agreement or the collective bargaining agreements. Nor is there evidence that ICP was intended to be a beneficiary of the collective bargaining agreements.

In any event, the court is not persuaded that common law remedies are, or ought to be, available under these circumstances.[7] The court finds that the Fund's common law claims have no merit as a matter of law, whether grounded in state or federal common

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[7] Additionally, to the extent that the plaintiffs' common law claims depend on the purported 2005 assignment by Top to the Fund, the defendant has raised serious questions about the validity and enforceability of that assignment. (*See* Docket No. 39 at 22-24). Having determined that the 1992 Agreement does not obligate ICP to pay any withdrawal liability incurred by Top, the court need not rule on the effect, if any, of the 2005 assignment.

law. Summary judgment, therefore, will be granted in ICP's favor as to Count II.

C. Count III: Contract Claim

In Count III of the Complaint, the Fund claims that ICP is liable to the Fund for over $1 million with respect to Top's withdrawal liability. This claim is based on the 1992 Agreement between ICP and Top, and it is also dependent on an assignment of Top's rights under that contract that the Fund obtained in 2005 in its litigation with Top several years ago. The defendant maintains that, as a matter of law, Count III has no merit because (1) the 1992 Agreement never obligated ICP to pay Top for any withdrawal liability and (2) the Fund's contract claim, which depends on a 2005 assignment by Top to the Fund, is not actionable as a result of an Illinois corporation law statute of repose.

The Agreement itself is silent as to choice of law. A federal court sitting in diversity jurisdiction applies the law of the state in which it sits, including that state's laws regarding choice of law. *See Johnson v. Ventra Group, Inc.*, 191 F.3d 732, 738 (6th Cir. 1999) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 490 (1941)). In Tennessee, in the absence of a choice of law provision in a contract, the law of the place where a contract is made, *lex loci contractus*, governs the construction and validity of the contract. *Davis v. Connecticut Gen. Life Ins. Co.*, 743 F. Supp. 1273, 1278 (M.D. Tenn. 1990); *Wallace v. Gen. Star Indem. Co.*, 2007 WL 1624071, *3 (E.D. Tenn. June 1, 2007)(citing *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 466 (Tenn. 1973)).

The 1992 Agreement was signed by ICP in Tennessee. Consequently, Tennessee law will be applied to the breach of contract claim.

Under Tennessee law, the rights and obligations of contracting parties are governed by their written agreements. *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 758 (6th Cir. 1999)(citing *Hillsboro Plaza Enterps. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993)). The "cardinal rule [in interpreting contracts in Tennessee] . . . is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." *Frizzell Constr. Co., Inc. v. Gatlinburg, LLC*, 9 S.W.3d 79, 85 (Tenn. 1999) (quoting *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975)). Courts may determine the intention of the parties "by a fair construction of the terms and provisions of the contract, by the subject matter to which it has reference, by the circumstances of the particular transaction giving rise to the question, and by the construction placed on the agreement by the parties in carrying out its terms." *Frizzell*, 9 S.W.3d 79, 85 (quoting *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990)). No single clause is to be viewed in isolation; rather, the contract is to be "viewed from the beginning to end and all its terms must pass in review, for one clause may modify, limit or illuminate another." *Cocke County Bd. of Highway Comm'rs v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985). Where no ambiguity exists, this court must attribute the ordinary meaning to the words used, and neither party is to be favored in their construction. *Clark v. Rhea*, 2004 WL 63476, at *2 (Tenn. Ct. App. Jan. 13, 2004)(citing *Brown v. Tenn. Auto Ins. Co.*, 237 S.W.2d 553, 554 (Tenn. 1951)).

In Count III, the plaintiffs claim that ICP is required to pay the withdrawal liability "pursuant to the unambiguous terms of the ICP Agreement." (Docket No. 37 at 14). In support of their claim, the plaintiffs rely on different sections of the 1992 Agreement. First, the plaintiffs point to Section 3, which states:

> OPERATOR [Top] shall bill COMPANY [ICP] its actual costs and expenses of operation hereunder plus a weekly service charge of $35.00 per employee. Such costs and expenses shall include, but not be limited to, direct wages, salary payments, payroll taxes and necessary fringe benefits, insurance and administration applicable to the operations.

(1992 Agreement). The plaintiffs claim that the language of this section, obligating ICP to reimburse Top for "actual costs and expenses" including "necessary fringe benefits," is broad enough to encompass withdrawal liability.

The court finds that the language of Section 3 is unambiguous. It is silent on the issue of withdrawal liability. By its express terms, it obligates ICP to reimburse Top for its "actual costs and expenses *of operations*," including but not limited to "necessary fringe benefits . . . *applicable to the operations*." (*Id.*)(emphasis added). Such "necessary fringe benefits" includes, among other things, reimbursements for contributions to the pension fund that Top pays on behalf of its truck drivers. However, as the court explained in *Transpersonnel*, "the obligation to *reimburse* for contributions made by another is not the equivalent of an obligation to *contribute* in the first instance." *Id.* at 461 (emphases in original). The two limiting phrases "of operations" and "applicable

to operations" indicates that, once the contract terminates and operations between the ICP and Top cease, this language no longer obligates ICP to reimburse Top for any operational costs or any other costs, including reimbursements for pension contributions on behalf of Top drivers. Nevertheless, Top—by virtue of its contractual relationship with Teamsters—remains obligated to contribute to the Fund.

Section 3 of the 1992 Agreement obligates ICP to pay for actual costs and expenses of operations similar to the prior agreement between the parties in 1971. The 1971 Agreement predated enactment of the MPPAA's 1980 withdrawal liability provisions and, thus, there could have been no intent for ICP to pay Top's withdrawal liability under the 1971 contract; that concept had not yet been enacted in the law.

Robert Henningsen, the executive who signed the 1992 Agreement on behalf of ICP, and the only witness to that contract who has testified in this matter, stated that neither side discussed withdrawal liability (even though the MPPAA had been enacted twelve years earlier) when the 1992 Agreement was renegotiated and signed. He explained that the parties "were generally familiar with the concept," but felt that it had no relevancy to the Top-ICP relationship.

After investigating whether ICP might be subject to withdrawal liability in 1994 after Top raised the issue during an on-site visit, Henningsen sought legal advice about the matter. When Henningsen conveyed to Top's President ICP's position, on advice of counsel, that withdrawal liability was not an obligation of ICP, Top did not dispute that assertion. Only years later, after ICP terminated the contract in 2002 and

the Fund sued Top, did withdrawal liability become an issue. Even then, the alleged liability was not asserted by Top, a party to the contract; it was raised by a third party, the Fund.

The court finds that the plain language of Section 3 evidences no intent by the parties to the 1992 Agreement to obligate ICP to reimburse Top for withdrawal liability. The contract's total silence about paying Top's withdrawal liability is consistent with the facts and circumstances leading up to and surrounding the 1992 Agreement. For these reasons, the plaintiffs' contract claim based on Section 3 of the 1992 Agreement fails.

Next, the plaintiffs claim that language in Section 5 of the ICP Agreement provides that ICP must indemnify Top for any withdrawal liability. The language reads:

> COMPANY [ICP] further agrees to indemnity [sic] and save OPERATOR [Top] from real or asserted liability, including cost of defense, connected with or resulting from the ownership, custody, maintenance, use or operation of the vehicles and/or equipment hereunder, which liabilities are not covered by the insurance provided by COMPANY [ICP], or if the covered [sic] are in excess of the policy limits.

(1992 Agreement).

The court disagrees with the plaintiffs' characterization of this language. This language is not an indemnification clause with respect to withdrawal liability. This language is found within the section of the Agreement outlining the nature and amount of vehicle liability insurance ICP is obligated to provide. Providing context, Section 5 of the Agreement begins:

"COMPANY agrees to provide and maintain on each vehicle operated by an OPERATOR driver, Public Liability and Property Damage Insurance in the amount of $1,000,000 Combined Single Limit." (*Id.*) Pursuant to this language, ICP's contractual obligation is to indemnify Top for any liabilities incurred "due to cost of defense, connected with or resulting from the ownership, custody, maintenance, use or operation of the vehicles and/or equipment" not covered by or in excess of the insurance policy provided by ICP. To conclude that this language provides a promise of indemnification for withdrawal liability by ICP to Top is a vast overreading of the provision.

The plaintiffs cite *Transpersonnel* and *D.C. Transportation Services* for support of their indemnification claim. While the court in *Transpersonnel* did not question Transpersonnel's right to seek indemnification for withdrawal liability, the court did not provide any details of the indemnification clause on which Transpersonnel relied. In fact, the court did not analyze the Transpersonnel's right to seek indemnification *at all* since, after the case was remanded, the district court dismissed the claim without prejudice because the indemnification claim was not ripe. *See* 2004 WL 868565, *5. In *D.C. Transportation Services*, the commercial arbitrator had found, and the court agreed, that the leasing agreement required ABARTA to indemnify Commercial Drivers for that portion of the withdrawal liability that could be attributed to services ABARTA received. However, the terms of the *D.C. Transportation Services* leasing contract differ dramatically from those relied upon by the plaintiffs in the instant case:

> 11. Lessee [ABARTA] shall bear full responsibility for any withdrawal liability . . . if such liability arises with respect to or in connection with the drivers provided to Lessee under this Agreement or contributions with respect to such drivers. Further, Lessee shall indemnify and hold Lessor harmless from such withdrawal liability that may be asserted against Lessor and any costs, fees or expenses related thereto.

Id. at 1008. Easily distinguishable, then, *D.C. Transportation Services* provides no support for the plaintiffs' indemnification claim.

In sum, the court finds that neither Section 3 nor 5 of the 1992 Agreement obligates ICP to pay withdrawal liability. Having so found, the court need not address the plaintiffs' remaining assertion, that the assignment executed by Top in 2005 in favor of the Pension Fund is valid and enforceable against ICP.

Because the 1992 Agreement did not obligate ICP to pay Top's withdrawal liability, the Fund's contract claim has not merit. Accordingly, the defendant's Motion for Summary Judgment as to Count III will be granted.

The court need not address the plaintiffs' argument that ICP has waived the right to challenge the Pension Fund's withdrawal liability calculation.

V. Conclusion

For the reasons stated above, the plaintiffs' Motion for Summary Judgment (Docket No. 37) will be denied, and the defendant's Motion for Summary Judgment

(Docket No. 38) will be granted. Accordingly, all claims against defendant will be dismissed.

Entered this 3rd day of July, 2008.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed: Feb 18, 2010]

No. 08-5949

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

INTERNATIONAL COMFORT PRODUCTS, LLC,
Defendant-Appellee.

BEFORE: KETHLEDGE and WHITE, *Circuit Judges*; and POLSTER,* *District Judge*.

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

* Hon. Dan A. Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX D

STATUTES

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

(b) For purposes of subsection (a) of this section—

(1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in section 1385 of this title.

29 U.S.C. § 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

* * * *

29 U.S.C. § 1392. Obligation to contribute

(a) "Obligation to contribute" defined

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

(b) Payments of withdrawal liability not considered contributions

Payments of withdrawal liability under this part shall not be considered contributions for purposes of this part.

(c) Transactions to evade or avoid liability

If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be

applied (and liability shall be determined and collected) without regard to such transaction.